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No. 89-778

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WILLIAM W. HOLLANDER,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table Of Authorities	iii
Jurisdiction	1
Constitutional Provision, Statutes And Rules Involved In The Case	3
Statement Of The Case	4
Reasons For Denying The Writ	7
I. The Issue Of Respondent's Authority To Appoint Petitioner Pursuant To 28 U.S.C. §1915(d) Is Moot	7
IIA. This Court Has Long Recognized Certain Powers Inherent In The Federal Courts Not Derived From Statute In Aid Of The Jurisdiction Of The Courts	7
IIB. The Eighth Circuit's Ruling That Respondent Properly Appointed Petitioner Pursuant To Respondent's Inherent Power Is Consistent With Unanimous Federal Case-law Holding That The Federal Courts Have Inherent Power To Appoint Counsel To Represent Indigent Litigants	9
IIIA. The Eighth Circuit's Ruling That Compelled Service Of Appointed Counsel Is Not An Unconstitutional "Taking" Is Consistent With Rulings Of This Court And The Other Federal Courts Of Appeals	10

IIIB. The Record Is Devoid Of Any Evidence That Petitioner Has Borne Any Costs Or Expenses And, Therefore, Petitioner's Fifth Amendment Claim Of A Taking Without Just Compensation Is Premature And Not Ripe For Decision 12

Conclusion 13

TABLE OF AUTHORITIES

Page

Cases:

Dolan v. United States, 351 F.2d 671 (5th Cir. 1965).... 9

Family Division of Trial Lawyers of the Superior Court-D.C., Inc. v. Moultrie, 725 F.2d 695 (D.C. Cir. 1984) 11,12

Hurtado v. United States, 410 U.S. 578, 93 S.Ct. 1157, 34 L.Ed.2d 508 (1973)..... 10

In re Peterson, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920)..... 8

In re Rouss, 221 N.Y. 81, 116 N.E. 782 (1917)..... 10

Levine v. United States, 362 U.S. 610, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960)..... 8

Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) 8

Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. ____, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989)..... 5,7

Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry., 266 U.S. 42, 45 S.Ct. 18, 69 L.Ed. 162 (1924)..... 8

Nelson v. Redfield Lithograph Printing, 728 F.2d 1003 (8th Cir. 1984) 13

Peterson v. Nadler, 452 F.2d 754 (8th Cir. 1971)..... 9

Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)..... 9,11

Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) 8

State ex rel. Scott v. Roper, 688 S.W.2d 757 (Mo. 1985) (banc) 11

Theard v. United States, 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957) 9,10

Tyler v. Lark, 472 F.2d 1077 (8th Cir.), *cert. denied sub nom.* Beilenson v. Treasurer of U.S., 414 U.S. 864, 94 S.Ct. 41, 38 L.Ed.2d 84 (1973) 11

United States v. Accetturo, 842 F.2d 1408 (3d Cir. 1988) 9,10

United States v. Bowe, 698 F.2d 560 (2d Cir. 1983) 9

United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), *cert. denied,* 382 U.S. 978, 86 S.Ct. 550, 15 L.Ed.2d 469 (1966) 9,10,11

United States v. Hudson, 11 U.S. (7 Cranch) 32, 3 L.Ed. 259 (1812) 8

White v. United States Pipe & Foundry Co., 646 F.2d 203 (5th Cir. Unit B 1981) 9,11

Williamson v. Vardeman, 674 F.2d 1211 (8th Cir. 1982) 13

Statutes and Rules:

28 U.S.C. §1254(1) 2

28 U.S.C. §1651(a) 1,2

28 U.S.C. §1915(d) 7

S.Ct. R. 14.1(e)(iv) 1

S.Ct. R. 20.1 2

S.Ct. R. 21.1(e)(iv)(superseded) 1

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Respondent United States District Court for the Eastern District of Missouri respectfully requests that the Court deny the petition for writ of certiorari seeking review of the decision in this case of the United States Court of Appeals for the Eighth Circuit.

JURISDICTION

Pursuant to S.Ct. R. 21.1(e)(iv) (superseded effective January 1, 1990, by S.Ct. R. 14.1(e)(iv)), petitioner has erroneously invoked this Court's jurisdiction under the All Writs Statute, 28

U.S.C. §1651(a), in seeking a common-law writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Supreme Court Rule 20.1 provides as follows:

> The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. §1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

Petitioner has presented no exceptional circumstances warranting the exercise of this Court's discretionary powers under the All Writs Statute. Petitioner seeks nothing more than the Court's review of an adverse appellate court decision. Petitioner has, therefore, failed to make the requisite showing set forth in S.Ct. R. 20.1 to justify the granting of a common-law writ of certiorari authorized by 28 U.S.C. §1651(a). If this Court has jurisdiction, the basis for that jurisdiction does not lie under 28 U.S.C. §1651(a).

Petitioner is seeking review of an order filed on September 12, 1989 by a panel of the United States Court of Appeals for the Eighth Circuit denying petitioner a writ of mandamus. Petitioner did not move for a rehearing of the Eighth Circuit's decision, but instead filed his petition for common-law certiorari in this Court on October 27, 1989. Petitioner can obviously obtain adequate relief in this Court in a form other than an extraordinary writ under the All Writs Statute. *See, e.g.*, 28 U.S.C. §1254(1).

Accordingly, because petitioner has failed to demonstrate the existence of any facts or circumstances in support of this Court's jurisdiction under 28 U.S.C. §1651(a), respondent

respectfully requests that the Court deny the petition for writ of common-law certiorari.

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED IN THE CASE

U.S. Const. fifth amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. §1254(1)

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

28 U.S.C. §1651(a)

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. §1915(d)

> (d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the

case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

S.Ct. R. 14.1(e)(iv)
S.Ct. R. 21.1(e)(iv)(superseded)

.1 The petition for a writ of certiorari shall contain, in the order here indicated:

. . . .

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:

. . . .

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

S.Ct. R. 20.1

.1 The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. §1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

STATEMENT OF THE CASE

On September 19, 1988, Eldon Mellott, an inmate at the Missouri Training Center for Men in Moberly, Missouri, filed in the United States District Court for the Eastern District of Missouri a pro se civil rights complaint under 42 U.S.C. §1983 styled *Eldon Mellott v. Dr. King, et al.*, No. N88-0136-C. Mellott simultaneously filed an application to proceed in forma pauperis, which was granted.

On October 28, 1988, Mellott filed a motion for appointment of counsel. On December 1, 1988, the Honorable George F. Gunn, Jr., United States District Judge, entered an order pursuant to 28 U.S.C. §1915(d) appointing petitioner, William W. Hollander, to represent Mellott in his civil rights action. On December 15, 1988, petitioner accepted the appointment and voluntarily entered his appearance as follows:

> COMES NOW William W. Hollander and enters his appearance on behalf of Plaintiff, Eldon Mellott.
>
> W. MORRIS TAYLOR, P.C.
>
> By: /s/ William W. Hollander

Petitioner is licensed to practice law in the State of Missouri, and since November 24, 1988, has been a member of the Bar of the United States District Court for the Eastern District of Missouri.

Relying on this Court's May 1, 1989, decision in *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. ____, 109 S.Ct. 1814, 104 L.Ed. 2d 318 (1989), petitioner filed a motion to withdraw. Petitioner argued that he lacked the time and necessary resources to devote to the prosecution of Mellott's lawsuit, did not desire to represent him, would never have voluntarily entered his appearance on Mellott's behalf, and would suffer undue hardship if compelled to continue representing Mellott. Thus, more than six months after petitioner's appointment on December 1, 1988, and his voluntary entry of appearance on December 15, 1988, petitioner raised for the first time his numerous objections to his appointment by the district court to represent Mellott.

On August 15, 1989, the district court denied petitioner's motion to withdraw and ruled that "[t]he Court shall require Mr. Hollander to represent plaintiff, an indigent who is unable to retain counsel, pursuant to this Court's inherent powers."

Petitioner then filed a petition for writ of mandamus in the United States Court of Appeals for the Eighth Circuit on September 1, 1989.

A three-judge panel of the Eighth Circuit Court of Appeals in an order dated September 12, 1989, denied the petition for writ of mandamus, ruling that the district court had acted properly within its inherent powers. Petitioner did not file a motion for rehearing or rehearing *en banc*. The mandate issued on October 17, 1989.

On October 27, 1989, petitioner filed his petition for a writ of certiorari with this Court.

REASONS FOR DENYING THE WRIT

I. THE ISSUE OF RESPONDENT'S AUTHORITY TO APPOINT PETITIONER PURSUANT TO 28 U.S.C. §1915(d) IS MOOT.

The issue of respondent's authority to appoint petitioner pursuant to 28 U.S.C. §1915(d) is moot. On December 1, 1988, respondent initially appointed petitioner to represent an indigent inmate in his 42 U.S.C. §1983 action against a prison doctor, dentist and other prison officials. *See* Pet. for Cert., App. B at A-3. Without objection, petitioner accepted the appointment and voluntarily entered his appearance for the plaintiff. Six months later, this Court ruled that 28 U.S.C. §1915(d) did not authorize a federal court to require an unwilling attorney to represent an indigent litigant in a civil case. *Mallard v. United States District Court for the Southern District of Iowa,* 490 U.S. ____, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989).

Relying on *Mallard,* petitioner moved to withdraw. Respondent denied the motion and entered an order on August 15, 1989, requiring petitioner to represent the plaintiff "pursuant to this Court's inherent powers." Pet. for Cert., App. C at A-4. Petitioner then unsuccessfully sought a writ of mandamus from the Eighth Circuit Court of Appeals.

Because respondent's August 15, 1989 order reappointing petitioner to represent the inmate under the inherent power of the district court supplants respondent's earlier order made pursuant to 28 U.S.C. §1915(d), any question concerning the validity of respondent's December 1, 1988 order is now moot.

IIA. THIS COURT HAS LONG RECOGNIZED CERTAIN POWERS INHERENT IN THE FEDERAL COURTS NOT DERIVED FROM STATUTE IN AID OF THE JURISDICTION OF THE COURTS.

Contrary to petitioner's assertion that federal courts possess only such powers as Congress has conferred upon them by statute, this Court as early as 1812 stated:

> Certain implied powers must necessarily result to our courts of justice from the nature of their institution. . . . To fine for contempt, imprison for contumacy, inforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far as *our courts no doubt possess powers not immediately derived from statute;* . . . .

United States v. Hudson, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812) (emphasis added). Subsequent decisions of this Court have repeatedly recognized a variety of powers inherent in the federal courts reasonably necessary for the proper administration of justice in the exercise of their jurisdiction. *See, e.g., Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764-66, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (federal courts have inherent powers to assess attorneys' fees and expenses against counsel as sanction); *Link v. Wabash Railroad Co.,* 370 U.S. 626, 630-31, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (authority of court to dismiss sua sponte for lack of prosecution is an inherent power governed by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases); *Levine v. United States,* 362 U.S. 610, 615, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960) ("the power to convict for criminal contempt has been deemed an essential and inherent aspect of the very existence of our courts"); *Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry.,* 266 U.S. 42, 65-66, 45 S.Ct. 18, 69 L.Ed. 162 (1924) (power to punish for contempt is inherent and essential to the administration of justice); *In re Peterson,* 253 U.S. 300, 312-13, 40 S.Ct. 543, 64 L.Ed. 919 (1920) (courts have "inherent power to provide themselves with appropriate instruments required for the performance of their duties" by appointing special masters, auditors, examiners, and commissioners).

IIB. THE EIGHTH CIRCUIT'S RULING THAT RESPONDENT PROPERLY APPOINTED PETITIONER PURSUANT TO RESPONDENT'S INHERENT POWER IS CONSISTENT WITH UNANIMOUS FEDERAL CASELAW HOLDING THAT THE FEDERAL COURTS HAVE INHERENT POWER TO APPOINT COUNSEL TO REPRESENT INDIGENT LITIGANTS.

In *Powell v. State of Alabama,* 287 U.S. 45, 73, 53 S.Ct. 55, 77 L.Ed. 158 (1932), this Court ruled that the district court's power to appoint counsel for the indigent defendants in that case, "*even in the absence of a statute,* cannot be questioned." (Emphasis added). The Court emphatically declared, "Attorneys are officers of the court, and are bound to render service when required by such an appointment." *Id. See Theard v. United States,* 354 U.S. 278, 281, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957) (a lawyer is an officer of the court which granted admission, and like the court itself, is an instrument or agency to advance the ends of justice).

All existing federal appellate court decisions hold that district courts have the inherent power to appoint counsel to represent indigent litigants. *See United States v. Accetturo,* 842 F.2d 1408, 1413 (3d Cir. 1988); *United States v. Bowe,* 698 F.2d 560, 566 (2d Cir. 1983) (court has inherent authority to do those things necessary for the administration of justice in the exercise of its jurisdiction, including the power to appoint counsel to represent indigents); *White v. United States Pipe & Foundry Co.,* 646 F.2d 203, 205 n.3 (5th Cir. Unit B 1981); *Peterson v. Nadler,* 452 F.2d 754, 758 (8th Cir. 1971); *Dolan v. United States,* 351 F.2d 671, 672 (5th Cir. 1965); *United States v. Dillon,* 346 F.2d 633, 635-36 (9th Cir. 1965), *cert. denied,* 382 U.S. 978, 86 S.Ct. 550, 15 L.Ed.2d 469 (1966). As the Third Circuit recently explained in finding the existence of inherent power to appoint:

> There is a symbiotic relationship between the court and the attorneys who are members of its bar. The court's

> responsibility for the administration of justice would be frustrated were it unable to enlist or require the services of those who have, by virtue of their license, a monopoly on the provision of such services. Attorneys who have the privilege of practicing before the court have a correlative obligation to be available to serve the court.

United States v. Accetturo, 842 F.2d at 1413. *See Theard v. United States,* 354 U.S. at 281 ("Membership in the bar is a privilege burdened with conditions.") (quoting *In re Rouss,* 221 N.Y. 81, 84, 116 N.E. 782 (1917) (Cardozo, C.J.)); *United States v. Dillon,* 346 F.2d at 635 ("representation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court").

As demonstrated above, the federal authorities have unanimously and long held that federal courts have inherent powers not derived from statute in aid of the courts' jurisdiction, and that one of those inherent powers is the power to appoint counsel to represent indigents. Petitioner has failed to show any reason why this Court should disturb these holdings by exercising its discretion to undertake the review of this case.

IIIA. THE EIGHTH CIRCUIT'S RULING THAT COMPELLED SERVICE OF APPOINTED COUNSEL IS NOT AN UNCONSTITUTIONAL "TAKING" IS CONSISTENT WITH RULINGS OF THIS COURT AND THE OTHER FEDERAL CIRCUIT COURTS.

This Court in *Hurtado v. United States,* 410 U.S. 578, 588, 93 S.Ct. 1157, 35 L.Ed.2d 508 (1973), reaffirmed the established principle that "the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed." *Hurtado* involved a material witness's claims of financial losses suffered during pretrial detention because he was compensated at the statutory rate of only one dollar a day. This Court noted that because there was a public obligation to

provide evidence, no fifth amendment taking occurred, no matter how financially burdensome it was.

In support of its decision, the *Hurtado* Court cited with approval *United States v. Dillon,* 346 F.2d 633 (9th Cir. 1965), *cert. denied,* 382 U.S. 978, 86 S.Ct. 550, 15 L.Ed.2d 469 (1966), as one of several examples of compulsory public service. *Hurtado v. United States,* 410 U.S. at 589. *Dillon* involved a claim for compensation of an attorney "conscripted" to represent a prisoner in a proceeding under 28 U.S.C. §2255. The attorney argued that failure to compensate him would contravene the just compensation clause. The Ninth Circuit, relying on *Powell v. State of Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), rejected the attorney's just compensation claim because there was no taking.

> An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking of his services."

United States v. Dillon, 346 F.2d at 635.

Without exception, other federal courts of appeals have uniformly rejected the arguments of appointed, uncompensated counsel that their compelled service is an unconstitutional taking without just compensation. *See Family Division Trial Lawyers of the Superior Court-D.C., Inc. v. Moultrie,* 725 F.2d 695, 705-06, 713 (D.C.Cir. 1984); *White v. United States Pipe & Foundry Co.,* 646 F.2d at 205 n.3.; *Tyler v. Lark,* 472 F.2d 1077, 1078-79 (8th Cir.), *cert. denied sub nom. Beilenson v. Treasurer of U.S.,* 414 U.S. 864, 94 S.Ct. 41, 38 L.Ed.2d 84 (1973). *See also State ex rel. Scott v. Roper,* 688 S.W.2d 757,

773 (Mo. 1985) (banc) ("If a requirement of uncompensated service in a criminal case does not constitute a 'taking' . . . then it cannot be said categorically that such violations exist in civil appointments. The two kinds of cases differ in degree but not quality.").

The courts have determined that an *unreasonable* amount of required uncompensated service might violate the fifth amendment. *See Family Division of Trial Lawyers of the Superior Court-D.C., Inc. v. Moultrie,* 725 F.2d at 705. But there is nothing in the record in this case on which a fair and fully informed decision can be made by this Court regarding the reasonableness of respondent's appointment of petitioner. The record is devoid of any evidence reflecting the degree of financial hardship, if any, the assigned representation would impose.

The Court should not exercise its discretion to review this constitutional question on the basis of such a skimpy and undeveloped record, especially in light of the unanimous federal authority holding that compelled, uncompensated service of attorneys does not constitute a taking under the fifth amendment.

IIIB. THE RECORD IS DEVOID OF ANY EVIDENCE THAT PETITIONER HAS BORNE ANY COSTS OR EXPENSES AND, THEREFORE, PETITIONER'S FIFTH AMENDMENT CLAIM OF A TAKING WITHOUT JUST COMPENSATION IS PREMATURE AND NOT RIPE FOR DECISION.

Petitioner argues that respondent's order requiring him to represent an indigent inmate is an unconstitutional taking because petitioner will have to pay costs and expenses out of his own pocket. Other than petitioner's naked, unsupported assertions, the record is devoid of any evidence that petitioner has in fact expended any of his own funds in the prosecution of this case. For this reason, any review of petitioner's claim that he has suffered a taking without just compensation because he has had to pay costs and expenses without reimbursement is premature and not ripe for decision.

The Eight Circuit has held that the payment of expenses by appointed counsel without reimbursement is an unconstitutional taking. *Williamson v. Vardeman,* 674 F.2d 1211, 1214-15 (8th Cir. 1982). For this reason, the Eighth Circuit has directed the chief judges of the district courts in the Eighth Circuit to provide for the reimbursement of appointed counsel for their expenses made in good faith. *Nelson v. Redfield Lithograph Printing,* 728 F.2d 1003, 1005 (8th Cir. 1984). Until petitioner has expended his own funds, he cannot complain of a taking. Moreover, the record does not reflect that petitioner has ever requested reimbursement for expenses, or that respondent has ever denied any such request for reimbursement. Petitioner did move that respondent *advance* his expenses, which respondent denied. Respondent's order denying this motion was entered *after* the Eighth Circuit's ruling on petitioner's request for a writ of mandamus. The Eighth Circuit has, therefore, never had an opportunity to consider any of the issues raised by respondent's denial of petitioner's request for an advance of his expenses.

For the foregoing reasons, any question of petitioner's payment of expenses without reimbursement is premature and not ripe for decision.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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